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No. 83-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,

Petitioners

v.

GROUP HOSPITAL SERVICE, INC.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I.

In some instances, the "facts" recited by respondent are contrary to its own admissions at trial—e.g., the tortured efforts to suggest that petitioners Galen and Tipton were not replaced by younger persons (Br. Op. 5, 7).[1] In other instances, respondent's "facts" constitute generalizations that the jury could properly have regarded as of no probative value—e.g., that because respondent ordinarily "promote[d] from within" it was common for older officials to be succeeded by younger ones (Br. Op. 8).[2] In most instances, respondent has simply committed

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[1] Respondent's answers to interrogatories, in evidence before the jury, stated that petitioner Galen was replaced by Tom Slack (D. Ex. 31, p. 5). And respondent's highest-ranking witness testified at trial that petitioner Tipton was replaced by Jerry Bagwell (Tr. 966). Not surprisingly, the court below recognized that all six petitioners were replaced by younger persons (App. 4a, 17a-18a).

In contrast, Vice President Hugh Eller was not "replaced" by Jim Wilson, an older Vice President (Br. Op. 5, 14). The undisputed facts show that Eller was terminated without replacement, Wilson assuming Eller's responsibilities in addition to his own (Tr. 897, 912-914). Wilson himself was gone by the following year, replaced by the (by then) 34-year old Tom Slack (Tr. 602, 834-835, 998).

[2] Respondent's evidence consisted principally of a showing that when older persons retire they are succeeded by younger ones. That, of course, is hardly comparable to an unprecedented "purge" of ten older officials who wanted to remain, accompanied by the selection of some of the youngest of their subordinates to replace them. Respondent was able to identify only three prior instances—widely separated in time—when a management official had been involuntarily removed from his job, and in each instance the cause for removal was (unlike here) gross deliquency: repeated instances of sexual harassment in one case (Tr. 188, 199-200); threatening subordinates with physical harm in another (Tr. 135-136, 199); and falsifying company records in the third (Tr. 147).

Contrary to respondent's statement (Br. Op. 6), the record shows unqualifiedly that petitioner Elliott's advancement to the regional sales manager position did not involve "the demotion of" an older employee; Elliott simply promoted past the older employee, who was not considered for the promotion because he had serious health problems (Tr. 306, 330-31, 930-31).

the common error of reciting the version of facts most favorable to the party against whom the jury ruled, ignoring the evidence that supports the jury's verdict.[3] The record, viewed most favorably to petitioners (for whom the jury ruled), fully supports the factual recitation in the petition, as reference to the record citations therein will substantiate. And, of course, the record must be viewed from that perspective at the appellate stage.

II.

Respondent does not dispute that a trier of fact is free to disbelieve the uncorroborated testimony of an employer witness as to the reason that motivated him to discharge an employee even in the absence of "countervailing evidence that it was not the real reason for the discharge" (App. 20a).[4] Nor does respondent dispute that, as this Court has recently reminded, "[w]hen the testimony of a witness is disbelieved, the trier of fact may simply disregard it." *Bose Corp.* v. *Consumers Union of United States*, —— U.S. ——, 52 L.W. 4513, 4520 (April 30, 1984).

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[3] For example, respondent cites its president's (Hachmeister's) testimony that "the company's market penetration in Texas hovered around twenty percent; a figure that . . . contrasted sharply with other states where Blue Cross plans were selling as much as seventy to eighty percent of the market" (Br. Op. 4). But other testimony fixed respondent's market penetration at thirty percent, and the highest in any other state in the forty-fifty percent range (Tr. 101), and provided as well the explanation for the lower penetration in Texas: in some states (but not Texas) state laws authorized reduced hospital rates to Blue Cross plan-members, thus giving the Blue Cross provider an automatic sales advantage over its competitors that did not exist in Texas (Tr. 186-87). The record also shows that Hachmeister's plan to increase respondent's market penetration in Texas was to be accomplished by investing $50 million of respondent's reserves (Tr. 103, 188-89), thus dispelling any inference that petitioners could have achieved a higher penetration in the past with the resources that had been made available to them.

[4] In addition to the cases cited in the Petition at 15-18, see *Dace* v. *ACF Industries, Inc.*, 722 F.2d 374, 377 n.6 (8th Cir. 1983).

Nonetheless, respondent contends that the holding below is not erroneous, advancing two theories: (1) that petitioners did not "dispute" the grounds for termination assigned by respondent's witnesses; and (2) that even if the testimony of respondent's witnesses were ignored, the evidence introduced by petitioners, admittedly sufficient (as the court below held) to establish a prima facie case, was not sufficient to warrant an inference of age discrimination. The first theory is wrong as a matter of fact. The second highlights a central issue of law that underpins our first question presented, and that needs to be resolved by this Court.

1. Repeatedly, respondent asserts that at trial petitioners did not "challenge" or "dispute" the reasons for the terminations advanced by respondent's witnesses. (Br. Op. 15, 16, 17, 19).[5] That assertion is flatly wrong. Petitioners, having learned through pretrial discovery what reasons would be proffered by respondent's witnesses, anticipated and disputed those reasons in their opening testimony.[6] And petitioners subjected respondent's witnesses to extensive cross-examination as to the reasons, eliciting many admissions helpful to plaintiffs' case.[7] Finally, petitioners called seven rebuttal witnesses for the express purpose of disputing that the reasons for discharge were as claimed by respondent's witnesses.[8]

Respondent picks up on the court of appeals' observation that petitioners did not "seriously dispute" the "objective truth" of the events that respondent's witnesses pointed to as motivating the termination decisions (App.

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[5] See also *id.* at 9 ("Petitioner Galen did not take the stand to present evidence that the reasons cited by Wilson for his discharge were pretextual in nature") and at 10 ("Petitioner Elliott offered no evidence of pretext").

[6] Tr. 92-96, 184-85, 217-18, 246-48, 259, 309, 343, 410-11, 421-22, 437-40, 457-60, 462-63, 474-87, 494-95, 507, 532.

[7] E.g., Tr. 548-49, 551, 557-58, 567-68, 571, 578, 594-95, 597, 715-18, 721, 724, 726, 782-84, 806-07, 813, 978-79, 990, 997-98, 1000-02.

[8] 1009-62.

20a). But that observation misses the point. An employer motivated by impermissible considerations in making terminations, and searching for a pretext, is unlikely to proffer "reasons" that are constructed from whole cloth. In the case of every long-term employee, there will be *something* that can be seized upon as a "legitimate" reason for termination, the "objective truth" of which cannot be "seriously disputed." Thus, the plaintiff's undertaking will rarely be to prove that the reason advanced by the employer is a total fabrication; rather, it will be to prove that the asserted reason is not what truly motivated the employer. The plaintiff will attempt to persuade the trier of fact that in all the circumstances (including the strength of the employee's overall work record, the precise facts surrounding the reason asserted by the employer, and the demeanor of the employer witness in testifying about the employment decision) the testimony of the employer witness that the asserted reason was the real reason should not be believed.

That is what happened here. Each of the petitioners presented evidence that he was consistently evaluated by respondent as an outstanding employee—evidence that alone would suggest that a legitimately motivated employer would not discharge the employee for trivial reasons. And each presented evidence demonstrating that the reason assigned by respondent's witnesses was in fact trivial. From this factual predicate, petitioners invited the trier of fact to assess the demeanor—and ultimately the credibility—of the witnesses for respondent who testified that indeed they had terminated these outstanding employees for such trivial reasons.

For example, while petitioner Galen did not dispute that he had informed the new president, Hachmeister, that he would like to be considered for the vice presidency if it became vacant, he vigorously disputed that the circumstances of the conversation could have led Hachmeister to perceive that he was "disloyal" to the incumbent vice president—the ground asserted by respondent for his termination. Galen testified, without contradiction,

that he told Hachmeister that he was not seeking to displace the incumbent, and that he was speaking up only in the event that the rumors were true that the job was about to become vacant (Pet. 5).[9]

Similarly, while petitioner Thompson did not dispute that the sales training program had been "neglected" during the year preceding his termination and thus needed "updating," he vigorously disputed that this could have prompted respondent to terminate him. He testified (with corroboration) that, as respondent well knew, the reason the program had been neglected is that the company president had diverted him from the sales training program for several months to work on special assignments (Pet. 8).

Likewise, while petitioner Tipton did not dispute that he had omitted a wall in the remodeling of the regional office, he vigorously disputed that this could have prompted respondent to terminate him, testifying (with corroboration) that the omission of the wall had been authorized by his immediate superior subject to confirmation by higher management, and that he had made arrangements with the contractor for the wall to be installed without cost on two hours' notice should the tentative approval not be confirmed (a fact known by respondent at the time it fired him) (Pet. 6).[10]

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[9] The rumors Galen had heard were that the incumbent vice president was going to be promoted to senior vice-president (Tr. 184-85).

[10] Respondent's "damaging testimony" respecting Tipton's claim (Br. Op. 13) is in fact an irrelevancy. All that Tipton "approved and accepted" in D. Ex. 37 was the terms of the lease for the new premises, not any layout or floor plan (Tr. 510-12). Nor did Tipton at any time "stipulate[] that his situation was not part of any reorganization"—a statement made by respondent at Br. Op. 7 without record citation; at all times, Tipton has contended that his termination was a part of the same pattern of terminating older officials that embraced the other five petitioners.

Petitioners Elliott and Spradley likewise disputed the reasons proffered by respondent's witnesses by introducing testimony that showed those "reasons" to be unlikely grounds for terminating them (Pet. 5-6, 7-8). Spradley did not "concede[] on cross-examination

To hold that in this context "the jury is not free to disregard" the innocent explanation proffered by the employer—the precise holding of the court below (App. 20a)—is, as we showed in our opening brief, to deprive the trier of fact of its ordinary fact-finding role through the imposition of an erroneous principle of law. And, as most employment discrimination cases ultimately turn on the credibility of the employer's assertion that it was motivated by something that actually exists in the employee's work history, the principle of law announced by the court below will preempt the fact-finding function in the vast majority of such cases. Any employer, no matter how badly motivated, need simply search the employee's record for something that can be proffered as "the" reason for discharge. So long as that reason is not "irrational or idiosyncratic . . . on its face" (App. 20a) the trier of fact will not be free to disregard it, unless the plaintiff can secure an admission that the assigned reason is "a mere cover or pretext" (*id.*). For, absent such an admission, the only way to prove pretext is as petitioners did here (and as the court below held impermissible)—by demonstrating the unlikelihood that in all the circumstances a legitimately motivated employer would discharge an employee for the reason assigned and inviting the trier of fact to assess the credibility of the employer's witness who testifies to that explanation.[11]

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that his career with the company had been on a rocky foundation for a number of years"—another statement made in respondent's brief without record citation (Br. Op. 11).

Petitioner Heffner introduced evidence showing that the "reasons" proffered by respondent's witnesses were in fact constructed from whole cloth (Pet. 6-7).

[11] The court of appeals' statement that each petitioner "offered no more than conclusionary statements of age discrimination" (App. 20a)—"little if anything more than his belief that age caused his discharge" (App. 21a)—simply reflects the court's erroneous *legal* view that the evidence plaintiffs *did* introduce was not the kind of "countervailing evidence" required to overcome the testimony of employer witnesses (App. 20a).

2. The other proposition advanced by respondent for sustaining the decision below is that "once established a prima facie case creates a rebuttable presumption of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue." (Br. Op. 20, quoting *Pace* v. *Southern Railway System*, 701 F.2d 1383, 1390 (11th Cir. 1983), cert. denied, —— U.S. ——, 104 S. Ct. 1334 (1984)).[12] Respondent contends that even if the testimony of its witnesses is ignored, the evidence presented by petitioners—although sufficient to establish a prima facie case—is insufficient to support a factual inference of age discrimination.

As we explained in the petition (at 19-21), central to our position is that a plaintiff who has established a prima facie case has by definition introduced evidence sufficient to permit a factual inference of discrimination. The court below disagreed (App. 20a, citing and following *Reeves* v. *General Foods Corp.*, 682 F.2d 515, 521-523 (5th Cir. 1982)). The lower courts are in conflict on this point. The Ninth and Eleventh Circuits have agreed with the Fifth. *Steckl* v. *Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983); *Pace, supra.* The Eighth Circuit has adopted the opposite view. *Wells* v. *Gotfredson Motor Co., Inc.*, 709 F.2d 493, 496 & n.1 (8th Cir. 1983).

At the root of this conflict is confusion over the meaning of this Court's analysis in *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). The courts that believe that a prima facie case does not necessarily permit a factual inference of discrimination have drawn

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[12] Contrary to the assertion at Br. Op. 19-20, in neither *Pace* nor *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983), cert. denied, —— U.S. ——, 104 S. Ct. 348 (1983), was this Court presented the issue posed in the instant case. In *Pace*, the court of appeals affirmed a holding that the plaintiff had failed to establish a prima facie case, and the passage quoted by respondent was a dictum; in *Massarsky*, the court of appeals merely affirmed a jury verdict in favor of the defendant.

that conclusion from the following passage in *Burdine*, 450 U.S. at 254 n.7 [13]:

> The phrase "prima facie case" not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* [*Corp.* v. *Green*, 411 U.S. 792 (1973)] should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

We believe that these courts have misread this passage. It is our submission that the passage should be understood as follows: a prima facie case creates not *merely* an inference (in which event the trier of fact would be "permit[ted]" *but not required* to rule in the plaintiff's favor if the defendant remained mute) but *also* a presumption (*requiring* the trier of fact to rule in the plaintiff's favor if the defendant remains mute). To read the passage as meaning that a prima facie case creates a presumption but *not* an inference would produce the anomalous result that, where defendants remain mute, plaintiffs could win employment discrimination cases although they never introduced evidence from which discrimination could rationally be inferred. That this Court did not intend that anomaly is, we suggest, evidenced by other portions of the *Burdine* opinion, as well as the later opinion in *U.S. Postal Service Bd. of Governors* v. *Aikens*, —— U.S. ——, 103 S. Ct. 1478 (1983). This Court stated in *Burdine* that evidence sufficient to constitute a prima facie case "give[s] rise to an inference of unlawful discrimination," 450 U.S. at 253. Once a prima facie case has been established, the employer must articulate its legitimate explanation "through the introduction of admissible evidence" (*id.* at 255; see also *id.* 255 n.9)—thus assuring that that explanation will be

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[13] See *Reeves*, 682 F.2d at 521-523; *Pace*, *supra*, 701 F.2d at 1391.

subject to scrutiny as to its credibility (*id.* at 255, n.10). And, after the employer has introduced its explanation, the plaintiff can prevail, *inter alia*, "by showing that the employer's proffered explanation is unworthy of credence" (*id.* at 256; *Aikens*, 103 S. Ct. at 1482). Perforce, if the trier of fact disbelieves the employer's testimony, it is free to find a violation based solely on the evidence constituting the plaintiff's prima facie case. Thus, the employer's testimony merely "*allow*[s] the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus" (*Burdine*, 450 U.S. at 257; emphasis added).[14]

As we noted in the petition (at 20), it would be remarkable if judgment were *required* for plaintiff when the employer remained silent, yet were *not permitted* when the employer instead took the witness stand and gave testimony that was not believed and that the trier of fact was free to "simply disregard" (*Bose Corp.* v. *Consumers Union*, *supra*).

At all odds, this question goes to the very heart of employment discrimination litigation, and the existing conflict in the circuits demonstrate the need for its prompt resolution.[15]

III.

With respect to the second question presented, we wish to note a recently-reported decision of the Tenth Circuit holding that "statistical evidence which alone might be

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[14] Ironically, the first post-*Burdine* decision by the Fifth Circuit to address this question understood *Burdine* as we do. *Haring* v. *CPC Intern, Inc.*, 664 F.2d 1234, 1239 (5th Cir. 1981). Subsequently, in *Reeves*, *supra*, a different panel of that court, declaring that *Haring* did not hold what it appeared to hold (682 F.2d at 522-523, n.11), adopted the opposite reading followed in the decision below.

[15] On April 30, 1984, this Court dismissed as improvidently granted the writ of certiorari in *Westinghouse Electric Corp.* v. *Vaughn*, 52 L.W. 4523, referred to at Pet. 14 n.9.

insufficient to establish a prima facie case of dismrimination or to discredit an employer's proffered reason for its action" may nonetheless be considered by the fact-finder in conjunction with other evidence of discriminatory intent. *Beck* v. *Quiktrip Corp.*, 708 F.2d 532, 535 (10th Cir. 1983). (See discussion at Pet. 27-28).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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